



Tightening Your Belt: Inequities and Inconsistencies Regarding the Treatment of Food, Prescription Drugs, and Cigarettes In the United States Bankruptcy Code

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Tightening Your Belt:

Inequities and Inconsistencies Regarding the
Treatment of Food, Prescription Drugs, and
Cigarettes in the United States Bankruptcy Code

April 2011

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Class of 2012

Tightening Your Belt:

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Abstract: Debtors seeking to file bankruptcy may do so under either Chapter 7 or Chapter 13 of the Bankruptcy Code. In either case, the bankruptcy system must determine what expenses will be allowed for the debtor in bankruptcy, including for substances such as food, drugs, and cigarettes. This paper examines the treatment of these three substances by the Bankruptcy Code and judges, based on the three standards that appear in the Code: (1) what is allowed by the IRS National Standards, (2) what would constitute “abuse” of the system, and (3) what expenses are “reasonably necessary.” We then discuss five adverse effects that result from these provisions, including horizontal inequities between Chapter 7 and Chapter 13, unfair geographical variations, vertical inequities between wealthier and poorer debtors, inconsistent judicial application of the rules, and inconsistency between the bankruptcy regime and other federal agencies and priorities.

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I. INTRODUCTION: PURPOSE AND FUNCTION OF CHAPTERS 7 AND 13 OF THE UNITED STATES BANKRUPTCY CODE

In any capitalist society that allows for the accumulation of wealth by the “winners,” provisions must also be available to insulate the “losers” from the eternal trappings of debt.¹ Such refuge is available in Chapters 7 and 13 of the United States Bankruptcy Code (“the Code”), Title 11 U.S.C., which seeks both to offer a new start to struggling consumer debtors and equitably to distribute assets and income streams among debtors and creditors.

Part I of this paper offers a discussion of Chapters 7 and 13. Part II is an examination of how the Code treats three substances: food, drugs, and cigarettes. In Part III, this paper explores five adverse and unintended consequences of the substance rules, including horizontal inequities between Chapter 7 and Chapter 13, unfair geographical variations, vertical inequities between wealthier and poorer debtors, inconsistent judicial application of the rules, and inconsistency between the bankruptcy regime and other federal agencies and priorities. Part IV concludes.

A. CHAPTER 7 BANKRUPTCY

1. Function and Administration: Chapter 7, also known as liquidation bankruptcy, allows a court-appointed trustee to take control of and liquidate all of a debtor’s non-exempt assets, using the proceeds to pay secured creditors, and then to reimburse unsecured creditors at a pro rata share from any remaining funds.² The debtor then receives an immediate discharge from all debts³ and is free to reenter society with a fresh start.

2. Threshold Eligibility: Until recently, Chapter 7 bankruptcy was available to all debtors, barring a finding by the supervising court that granting the petition would be a “substantial abuse” of the system. In 2005, however, President Bush signed into law the

¹ ELIZABETH WARREN & JAY WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 143 (6th ed. 2009).

² 11 U.S.C. § 726 (2010).

³ 11 U.S.C. § 727 (2010).

Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which drastically altered this standard in an attempt to curb what the administration saw as rampant abuse by individuals who could afford to pay more to their creditors but were looking for a quick and easy way to clear their debts.⁴ Most scholars have rejected this explanation, noting that nearly all bankruptcies are attributable to forces beyond the control of the debtor,⁵ and that the motivations behind BAPCPA's enactment were built on "mean-spiritedness" and "intellectual dishonesty."⁶ It is also believed to have added unnecessary complexity to an already difficult statute.⁷

3. Below-Median Debtors: The legal standard for Chapter 7 eligibility now depends on whether the debtors' income (for their household size) falls above or below the median income in their state of residency.⁸ For below-median debtors, Chapter 7 is available unless the court finds such relief would be "abuse" of the system—a more restrictive version of the pre-BAPCPA "substantial abuse" test.⁹ It is unclear that this shift is meaningful in a practical sense, however, as judges have used similar judicial discretion under both standards. Indeed, not a single case under the old standard had allowed bankruptcy to progress after a finding that such relief would be an "abuse" of the system but not "substantial abuse."¹⁰

4. Above-Median Debtors: For wealthier debtors, the Code now features a complicated eligibility test, failure of which pushes debtors either into Chapter 13 or out of bankruptcy entirely. This new requirement, codified in § 707(b)(2) and commonly known as the "means

⁴ See generally Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

⁵ Ninety percent of all consumer bankruptcies are the direct result of "job difficulties, medical problems, and family breakups." WARREN & WESTBROOK, *supra* note 1, at 114.

⁶ Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Act of 2005*, 79 AM. BANKR. L.J. 191, 191 (2005).

⁷ See, e.g., *id.* at 191-93.

⁸ In 2009, the national median income was \$49,777, with a range of \$35,078 (MS) to \$64,851 (CT). U.S. Census Bureau, *State Median Income*, <http://www.census.gov/hhes/www/income/data/statemedian/index.html>.

⁹ 11 U.S.C. § 707(b)(1) (2010).

¹⁰ Collier on Bankruptcy ¶ 707.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

test,” creates a presumption of abuse (and therefore ineligibility) if the debtor’s current monthly income, less certain expenditures, exceeds statutory limits. These allowed expenditure amounts are specified in detail, and include payments for mortgages, cars, children’s tuitions, and some other expenses.¹¹ The determination of certain other costs, however, was administratively delegated to the IRS, which publishes National Standards and Local Standards for allowed expenditures of food, out-of-pocket health care, and other categories.¹²

The IRS’s numbers were derived from the Bureau of Labor Statistics’ (BLS) Consumer Expenditure (CE) Survey, which tracks actual expenditures.¹³ Accordingly, they were not promulgated pursuant to any administrative determination of the amounts appropriate for debtors in bankruptcy. Moreover, the IRS chose to use the BLS’s numbers for the Service’s own tax purposes, not with an eye toward their use in bankruptcy. Predictably, the National Standards’ importation into the bankruptcy context has led to unintended consequences.

B. CHAPTER 13 BANKRUPTCY

1. Function and Administration: Debtors seeking relief through Chapter 13 of the Bankruptcy Code keep possession of their assets, instead paying creditors a portion of their debts over a span of three to five years.¹⁴ In order to qualify, the debtor proposes a detailed budget using IRS Schedules I and J. If the creditors approve the budget, or if the plan provides for them to receive the entire disposable income of the debtor, the court shall confirm it for execution.¹⁵ At the end of the plan’s duration, a successful debtor receives a discharge from his debts.¹⁶ However, this is no small feat: tight budgets, lack of flexibility, and harsh consequences for even

¹¹ 11 U.S.C. § 707(b)(2) (2010).

¹² Other items include clothing, housekeeping supplies, housing, and personal care. IRS.gov, *National Standards: Food, Clothing and Other Items*, <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html>.

¹³ Bureau of Labor Statistics, *Consumer Expenditure Survey*, <http://www.bls.gov/cex/>.

¹⁴ 11 U.S.C. § 1322 (2010).

¹⁵ 11 U.S.C. § 1325 (2010).

¹⁶ 11 U.S.C. § 1328 (2010).

a single missed payment leave many debtors unable to complete their Chapter 13 plans. Sixty-seven percent fail before completing repayment and receive no discharge at all, and they must therefore reenter bankruptcy from the start or leave the system with all debts intact.¹⁷

2. Threshold Eligibility: A Chapter 13 plan may be confirmed when all secured creditors will be paid in full¹⁸ and when “all of the debtor’s projected disposable income . . . will be applied to make payments to unsecured creditors.”¹⁹ The meaning of “projected” has been the subject of much legal and judicial investigation,²⁰ but “disposable income” is statutorily defined as current monthly income reduced by those expenses which are “reasonably necessary” to the debtor and his/her family.²¹ Interpretation of this standard used to be within each bankruptcy judge’s discretion, but BAPCPA²² amended this test as well, again in the name of reducing abuse.²³ As in Chapter 7, BAPCPA created different standards for above- and below-median debtors, and it imported the rigid IRS numbers in certain contexts.

3. Below-Median Debtors: In determining what portion of income must be set aside for repayment to creditors, the “reasonably necessary” test has been wholly preserved for below-median debtors. No further guidance is provided in the statute, however, and bankruptcy judges must decide for themselves what expenses they deem necessary “for the maintenance or support of the debtor or a dependent of the debtor,”²⁴ subject only to very infrequent and deferential appellate review by Article III courts.²⁵

¹⁷ Scott F. Norberg, *Chapter 13 Project: Little Paid to Unsecureds*, 26-MAR AM. BANKR. INST. J. 1, 54 (2007).

¹⁸ 11 U.S.C. § 1325(a)(5) (2010).

¹⁹ 11 U.S.C. § 1325(b)(1)(B) (2010).

²⁰ See *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010).

²¹ 11 U.S.C. § 1325(b)(2) (2010).

²² See text accompanying notes 4-7.

²³ Lauren Sylvester, *Redefining Disposable Income in Chapter 13: Moving Forward into a “New Era in the History of Bankruptcy Law*, 42 J. MARSHALL L. REV. 1107, 1110-13 (2009).

²⁴ 11 U.S.C. § 1325(b)(2)(A)(i) (2010).

²⁵ Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 777-84 (2010) (adding that removal of bankruptcy judges from Article III status has exacerbated the problem).

4. Above-Median Debtors: Debtors with incomes above the state median must also meet the “reasonably necessary” test, but judges have very little discretion in confirming or rejecting expenses for these individuals. Instead, the Code explains that the amounts considered necessary shall be those available under the Chapter 7 means test in § 707(b)(2).²⁶ Again, debtors are therefore referred to the IRS National and Local Standards, as well as to the other statutory allowances discussed above.²⁷

While this standard seems symmetrical to that in Chapter 7, many scholars have criticized BAPCPA’s importation of the means-test numbers into Chapter 13 as inapposite. In Chapter 7, the § 707(b)(2) numbers are used merely to determine eligibility for relief, while in Chapter 13 they dictate what consumers may spend for up to five years.²⁸ What were merely quirks in Chapter 7 may be severe constraints in Chapter 13. Using fixed numbers instead of those that the debtor reports may also lead to an artificially-low calculation of disposable income, which is unfair both to creditors and to below-median debtors not entitled to this advantage.²⁹

A summary of the standards discussed thus far is available in Table 1. That table also offers the names of those standards as they will appear in the rest of this paper. Note that while this is a two-by-two grid, there are only three standards, as the test for expenditures is identical for above-median debtors in both applicable chapters. Also note that while the term “means test” is somewhat imprecise for Chapter 13—it uses the means test numbers, but in the context of budget confirmation—the legal literature uses it in this context.

²⁶ 11 U.S.C. § 1325(b)(3) (2010).

²⁷ 11 U.S.C. § 707(b)(2) (2010).

²⁸ Chelsey W. Tulis, *Get Real: Reframing the Debate Over How to Calculate Projected Income in §1325(b)*, 83 AM. BANKR. L.J. 345, 356-58 (2009).

²⁹ *Id.* at 358-60.

	Below-Median-Income	Above-Median-Income
CHAPTER 7 Threshold Eligibility	Liquidation bankruptcy available unless court determines that relief would be an “abuse” of the system.	Presumption of abuse and ineligibility if debtor fails means test. Failure if income less defined expenses exceeds statutory limits.
Authority	11 U.S.C. § 707(b)(1)	11 U.S.C. § 707(b)(2)
Name of Standard	Abuse	Means Test
CHAPTER 13 Threshold Eligibility	Bankruptcy plan confirmed if all disposable income is used to recompense creditors. Disposable income = Current Monthly Income minus “reasonably necessary” expenses, as determined by the court.	Bankruptcy plan confirmed if all disposable income is used to recompense creditors. Disposable income = Current Monthly Income minus “reasonably necessary” expenses, as determined by §707(b)(2).
Authority	11 U.S.C. §1325(b)(2)	11 U.S.C. §1325(b)(3)
Name of Standard	Reasonably Necessary	Means Test

Table 1: Threshold eligibility requirements for Chapter 7 and 13 debtors, statutory authority for these tests, and the nomenclature for these standards in this paper.

II. SUBSTANCES IN BANKRUPTCY: THE CODE’S TREATMENT OF FOOD, DRUGS AND CIGARETTES

We now embark on a deeper discussion of how the Bankruptcy Code and the courts that interpret it treat payments for three products: food, pharmaceutical drugs, and cigarettes. These three products seem distinct, but they share three appealing features that make for an interesting analysis. First, all three are arguably considered necessities by those who purchase them, so limits to their allowance should be carefully considered. Second, they represent the varying

degrees to which the bankruptcy system is willing to say “no” to debtors, ranging from almost no limits on drugs to near-complete disallowance for cigarettes. Third, as we will see, they provide a window into some of the inequitable and inconsistent effects in the bankruptcy system.

A. FOOD IN BANKRUPTCY

Although food is essential to every debtor’s survival, the amount of food allowed is by no means an easy determination. As we will see, how much a family in bankruptcy is entitled to spend on food, as well as the standards used to evaluate the expenses, depends largely on what chapter of bankruptcy the debtor is in. The amounts

1. Means-Test: For above-median debtors, § 707 of the Code cross-references to the IRS National Standards, which give concrete numbers for food consumption based on household size, as shown in Table 2.³⁰ These allowances are fairly inflexible, subject only to a 5% increase upon a showing of necessity.³¹ Note that government benefits like WIC (Women, Infants and Children Nutrition Program) and SNAP (Supplemental Nutritional Assistance Program) must be included in income,³² so debtors who receive these benefits do not double their food expenses.

Food Allowance Per Month	Household Size			
	1	2	3	4 ³³
Gross³⁴	\$300	\$537	\$639	\$757
Average	\$300	\$269	\$213	\$189
Marginal	\$300	\$237	\$102	\$118
Per-Meal³⁵	\$3.28	\$2.93	\$2.33	\$2.07

Table 2: Food expenditures allowed under the means test and the IRS National Standards.

³⁰ 11 U.S.C. § 707(b)(2) (2010).

³¹ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2010).

³² Justice.gov, *Form B22A*, http://www.justice.gov/ust/eo/bapcpa/dfs/docs/samples/BK_Form_B22A_V1.pdf.

³³ An additional \$262 allowance is allowed for additional members of the household. This is a comprehensive amount that includes expenditures for food, clothing, and other personal products and services.

³⁴ IRS.gov, *supra* note 12. Only the top-line numbers are provided by the IRS; all others were calculated here.

³⁵ Assuming an average of 3 meals per day and 30.5 days per month.

An examination of these numbers reveals several peculiarities about how the system works. First, the IRS Standards produce steep scaling effects, with both the marginal and average expenditures allowed dropping off precipitously as the household size grows. Elizabeth Warren has sardonically observed that “the IRS evidently believes that there are important economies of scale in meal preparation,”³⁶ and indeed this is precisely how the system works. Because larger families tend to buy in bulk, their proportionally lower expenses are reflected in the BLS’s Consumer Expenditure (CE) Survey.³⁷ Nevertheless, these effects can be harsh, especially for households that for any reason cannot or simply do not shop and cook like the average family. A family of four receives only 63% of the per-capita amount received by individuals; for some of them, cutting corners on food may become a necessity.

Second, the IRS numbers are not particularized to individual and family characteristics. A family of three will receive \$639 per month for food, regardless of whether the family consists of a single mother with two young children or a middle-aged couple with an elderly dependent, even though these households’ expenditures may significantly diverge. The omission of any particularized factors is especially striking given that the BLS already collects such numbers in the CE Survey that the IRS Standards are based on. The BLS publishes expenditure data broken down by age, sex, race, education, marital status, occupation, location, etc.³⁸ Although not all of these would be relevant in the bankruptcy context, the inclusion of at least some of them (such as age, marital status, or geography³⁹) might more accurately reflect what debtors require.

Third, the means-test numbers for food have no bearing at all on what a family *should* spend, only to what they *may* spend, based on what the average family *does* spend. Nutrition

³⁶ WARREN & WESTBROOK, *supra* note 1, at 155.

³⁷ See text accompanying notes 11-13.

³⁸ Bureau of Labor Statistics, *Consumer Expenditure Survey*, *supra* note 13.

³⁹ The geographical variation in food prices will be discussed in detail in Part III.B.

concerns are not even mentioned,⁴⁰ and the process is wholly divorced from normative considerations like fairness. This omission may reflect a congressional desire to promote objectivity in the Bankruptcy Code, but ultimately it is a failure and missed opportunity.

Fourth, the expenditure numbers allowed under the means test are not decreased for debtors who under-spend.⁴¹ Because the inflexible IRS numbers act in part as a floor, those who spend less than the allowances get a windfall from their creditors. For example, lawyers who may expense meals to their firms are still entitled to the full IRS allowance, even if their out-of-pocket expenses are lower. Such results were impossible before the passage of BAPCPA.

The fifth and final consequence is the inverse of the fourth: those with above-average expenses are constrained by the IRS standards, as the means test also acts as a ceiling. In one case, for example, a Chapter 13 debtor incurred food and personal expenses that exceeded IRS allowances by \$261.85, predominately because he often had to work out of town.⁴² The Bankruptcy Court rejected these expenses, explaining that § 1325(b) left no room for judicial discretion, even in cases that suggest a need for flexibility.⁴³ This restriction is slightly less harsh in Chapter 7, where a failure of the means test leads only to a presumption of abuse that may still be rebutted,⁴⁴ but in reality the IRS standards impose a fairly tight lid.

Common experience teaches us that food expenses vary widely based on individual characteristics, family size, and countless other work-related or personal idiosyncrasies. For the time being, however, above-median debtors and their creditors remain constrained by the rigid and derivative numbers in the IRS standards. As one scholar noted, “Congress demonstrated a

⁴⁰ People with expensive dietary restrictions (e.g. gluten-free) must rebut the presumption of abuse under §707(b).

⁴¹ For cars, the results are even more unusual: a car owner can claim the full car lien expense, simply because the means test has no provision for adjustments. *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716 (2011).

⁴² *In re Tuss*, 360 B.R. 684 (Bankr. D. Mont. 2007).

⁴³ *Id.* at 690-96.

⁴⁴ 11 U.S.C. § 707(b)(2)(B) (2010).

determination to replace judicial discretion under general standards with precise rules-based calculations. One can understand why bankruptcy judges would chafe at such restrictions, but that does not mean that Congress did not mean what it said.”⁴⁵

2. “Abuse” Standard: As discussed earlier, below-median debtors are entitled to Chapter 7 bankruptcy unless the court determines such relief would be an “abuse” of the system.⁴⁶ Unfortunately, the Code gives no further guidance, leaving the administration of this vague test to individual bankruptcy judges. Courts generally look at the “totality of the circumstances” on a case-by-case basis,⁴⁷ with some judges attempting to craft common-law tests.⁴⁸ The lack of unifying principles, however, has predictably led to a wide variation in the determination of what expenses, particularly regarding food, are considered abusive.

In measuring food expenses, many courts use federally-provided numbers to anchor their analysis. Some courts, for example, use the IRS Standards as their basis for what is non-abusive,⁴⁹ while others cite to different agencies like the Census Bureau.⁵⁰ In most of the cases that reach litigation, however, the standard used for evaluating food expenses is not made explicit. Instead, the petition is either confirmed or denied with little or no discussion of particular expenses, especially relatively small ones like food.⁵¹

⁴⁵ Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am. Bankr. Inst. L. Rev. 665, 682 (2005).

⁴⁶ 11 U.S.C. § 707(b) (2010).

⁴⁷ David B. Harrison, *Bankruptcy: When Does Filing of Chapter 7 Petition Constitute “Substantial Abuse” Authorizing Dismissal of Petition Under 11 U.S.C.A. § 707(b)*, 122 A.L.R. Fed. 141 (1986). This Report has been continuously updated and now contains analysis reflecting the post-BAPCPA “abuse” standard.

⁴⁸ *E.g.*, *In re Boule*, 415 B.R. 1 (Bankr. D. Mass. 2009); *In re Martin*, 417 B.R. 254 (Bankr. M.D.N.C. 2009); *In re Schwenk*, 414 B.R. 211 (Bankr. M.D. Pa. 2009); *In re Hand*, 323 B.R. 14 (Bankr. D. N.H. 2005).

⁴⁹ *In re Wiedner*, 344 B.R. 321, 326 (Bankr. M.D. Pa., 2005). Widespread use of this standard would, interestingly, collapse § 707 back into a single test.

⁵⁰ *In re Grant*, 51 B.R. 385, 396 (Bankr. N.D. Ohio 1985)

⁵¹ *See, e.g.*, *In re Boatright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009) (finding no abuse where, *inter alia*, debtor claimed \$750.00 food expense for a family of four); *In re Colgate*, 370 B.R. 50 (Bankr. E.D.N.Y. 2007) (finding abuse where, *inter alia*, debtor claimed \$1,000.00 food expense for a family of four).

Although the standards actually applied by the courts are cryptic, it is fair to say that many judges are disinclined to give debtors the benefit of the doubt on their food expenses. Cases abound where judges simply decide, without explanation, that an amount is excessive, using colloquial phrases such as “unusually high”⁵² or “more than adequate.”⁵³

Certain categories of food expenditures also seem to incur the ire of judges more readily than others. While no *per se* rules exist against classes of food (not even alcohol), eating frequently in restaurants is troublesome to judges,⁵⁴ and organic food is nearly out of the question.⁵⁵ The amounts in the cited cases are admittedly high, and those who eat in restaurants or eat expensive food may indeed be more likely to be abusing the system. That said, when judges look to these factors instead of just the amounts spent, they run the risk of basing access to the statutory protections of bankruptcy not on financial criteria but on lifestyle choices.

Of course, such harsh treatment of Chapter 7 debtors is not characteristic of all judges. Many courts are flexible in allowing higher expenses under particular circumstances, such as needing to dine out because of job requirements or residence in a group home.⁵⁶ Nonetheless, the general trend is against allowing high food expenses, especially above the IRS numbers. This distorts the meaning of “abuse”—it is hard to imagine that a family of five spending \$1,200 per month on food (including dining out) is truly *abusing* the system, even if they have failed to “engage in some good, old-fashioned belt tightening,”⁵⁷

Finding abuse so readily also ignores the realities of family behavior on the brink of bankruptcy. Instead of rampant abuse and excessive expenses, many households are forced to cut

⁵² *In re Camp*, 416 B.R. 304 (Bankr. E.D. Tex. 2009) (rejecting a \$1,200 food expense for a family of three).

⁵³ *In re McClellan*, 428 B.R. 737 (Bankr. N.D. Ohio 2009) (rejecting a \$1,200 food expense for a family of four).

⁵⁴ *In re Krohn*, 886 F.2d 123 (6th Cir. 1989) (rejecting a dining-out expense of over \$1,000 for a two-person household); *In re Camp*, supra note 52 (rejecting a \$1,200 food budget, much of it allocated to dining out).

⁵⁵ *In re Srikantia*, 417 B.R. 505 (Bankr. N.D. Ohio 2009) (rejecting a \$700 organic food expense for two).

⁵⁶ *In re Farrell*, 150 B.R. 116 (Bankr. D. N.J. 1992) (allowing a \$530 food expense for one person).

⁵⁷ See *In re Scarberry*, 428 B.R. 403 (Bankr. N.D. Ohio 2009) (rejecting \$1,200 food budget for family of five).

back on basic expenditures, with a full 19.4% going without food at some point within the two years before filing.⁵⁸ If judges are indeed re-conceiving of this vulnerable population as presumptive abusers, then Chapter 7 is in danger of severe underutilization.

3. “Reasonably Necessary” Standard: Below-median debtors in Chapter 13 must acquire approval for their expenses under the “reasonably necessary” standard discussed in Part I.B.3.⁵⁹ Like the “abuse” model, this standard suffers from a failure of specificity, and the courts have predictably struggled to promulgate a coherent set of principles for deciding what is reasonable. Even when judges have developed actual criteria, they tend to rely on balancing tests that provide no more clarity than the statute itself, such as “whether the expense is excessive,” or “whether expenses are deliberately inflated and unreasonable.”⁶⁰

As a result of this confusion, general trends are hard to identify. Not even the IRS Standards, which provide a benchmark for what level of food expenses is expected in bankruptcy,⁶¹ guarantee any certainty, for some plans with below-IRS food budgets are rejected,⁶² while some with above-IRS budgets are confirmed.⁶³ Flexibility is sometimes afforded to debtors—large food budgets have been approved for those who must dine out frequently because of job contingencies,⁶⁴ for example. Such treatment is by no means universal, however, and the search for identifiable standards remains elusive.

Part of the analytical problem is that, unlike in Chapter 7, debtors in Chapter 13 are not attempting to justify past expenditures, but rather are seeking approval for prospective expenses.

⁵⁸ David U. Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy*, 24 Health Affairs 63 (Web Supplement, 2005).

⁵⁹ 11 U.S.C. § 1325(b)(2) (2010).

⁶⁰ See, e.g., *In re Short*, 2008 WL 5751873 (Bankr. N.D. Ohio 2008) (citing *In re Navarro*, 83 B.R. 348, 355-56 (Bankr. E.D. Pa. 1988)).

⁶¹ *In re Miller*, 409 B.R. 299, 318 (Bankr. E.D. Pa. 2009).

⁶² *In re Stein*, 91 B.R. 796 (Bankr. S.D. Ohio 1988) (rejecting a \$780 food budget for a family of five).

⁶³ *In re Short*, supra note 60 (confirming a \$310 food budget for an individual).

⁶⁴ *In re Presley*, 201 B.R. 570 (Bankr. N.D. Fla. 1996) (accepting a \$400 food budget because the debtor had to eat away from home 2-3 meals per day).

These debtors are therefore unlikely to report large amounts for food, and even less likely to itemize for questionable expenses like dining out or organic food.⁶⁵ We are left with very limited case law addressing the adequacy or excessiveness of food costs in Chapter 13.

B. DRUGS IN BANKRUPTCY

In comparison to the allowances for food, debtors' expenses on drugs and other health costs are afforded almost complete deference by the Bankruptcy Code and courts. Let us begin our analysis with an investigation of the treatment of drugs by the means test.

1. Means-Test: Drug expenses are categorized by § 707(b) as part of “Out-of-Pocket Health Costs,” and are determined by the IRS National Standards.⁶⁶ These expenses, however, cross-reference not to the BLS but rather to the Medical Expenditure Panel Survey, administered by the Agency for Healthcare Research and Quality within the Department of Health and Human Services.⁶⁷ The AHRQ and IRS allow expenditures of \$60 for each family member under 65, and \$144 for those 65 or older. Remarkably, however, the IRS treats this number only as a floor. *Any* amount in excess may be claimed under the means test, provided it is necessary, substantiated, and not for elective expenses “such as plastic surgery or elective dental work.”⁶⁸

Health Cost Allowance Per Person Per Month	Age of Family Member	
	Under 65	65 or Older
Minimum	\$60	\$144
Maximum	All expenses allowed if necessary, substantiated and non-elective.	

Table 3: Drug/health expenditures allowed under the means test and the IRS National Standards.

⁶⁵ See text accompanying notes 54-55.

⁶⁶ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2010).

⁶⁷ AHRQ, *Medical Expenditure Panel Survey*, <http://www.meps.ahrq.gov/mepsweb/>.

⁶⁸ No other categories of IRS expenses share the same reference. IRS.gov, *National Standards: Out-of-Pocket Health Care*, <http://www.irs.gov/businesses/small/article/0,,id=173385,00.html>.

Nearly all of the consequences associated with food in the means test are moot for drug expenditures. Because the allowance is per-person instead of per-household, there are no scaling effects triggered by declining marginal expenses. Moreover, the lack of a ceiling means that those with extraordinary expenses are in no way constrained by the IRS Standards. It seems Congress⁶⁹ has made a normative choice that no debtor should have to forego medical decisions for the sake of their existing creditors.

The lack of a ceiling on health expenditures is the dominant feature of this allowance, but two other aspects also stand out. First, the existence of the expense floor means that those who spend less than the provided amounts get a windfall from their creditors, an anomalous result confirmed by the courts.⁷⁰ Second, neither Congress nor the IRS has put any limitation on the effectiveness of the goods or services purchased, except indirectly through the “necessity” prong. For example, drugs purchased need not be FDA-approved, and “alternative” treatments such as acupuncture or chelation therapy may be reimbursed as medical services.

While the Code itself has enabled this sweeping allowance, the IRS does retain the restrictions mentioned above: necessary, substantiated, and non-elective. Nonetheless, these limitations do very little work in practice, and the courts seem unwilling to deny the claims even in cases where one or more of the criteria are plainly triggered. In *Leggett*, for example, debtors claimed \$12,720 in orthodontic expenses for their children; the court allowed the expenditures without even a cursory investigation of either the necessity or electiveness prongs,⁷¹ even though the IRS *explicitly* disallows “elective dental work.”⁷²

⁶⁹ Or perhaps just the IRS, if Congress did not anticipate their limitless allowance for health costs.

⁷⁰ *In re Melancon*, 400 B.R. 521, 525 (Bankr. M.D. La. 2009) (“debtors are entitled to claim the national standard health care expenses on the means test form for purposes of determining disposable income, whether or not their documented prepetition health care expenses are lower than the national standard”).

⁷¹ *In re Leggett*, 2011 WL 802806 (Bankr. E.D.N.C. 2011).

⁷² IRS.gov, *National Standards: Out-of-Pocket Health Care*, *supra* note 68.

In short, the judges who evaluate these cases seem content in their deference to debtors' health claims. Indeed, it is difficult to identify even a single case where an above-median debtor failed the Chapter 7 means test or had a Chapter 13 expense denied on these grounds. Some of this may be self-selection, for it is unlikely that an informed debtor would attempt to claim an egregious or unsubstantiated claim, but judicial deference is still the norm.

2. Below-Median Standards: The courts' treatment of the "abuse" and "reasonably necessary" standards is so similar for drugs that we will discuss them simultaneously here. As with above-median debtors, judges have tended to be very lenient on the provision of health and drug expenditures in bankruptcy filings. Very few cases have spoken directly to the issue of what expenses are allowable under the bankruptcy provisions, and those that have done so have granted extensive deference.⁷³ Indeed, only when an expense lacks substantiation do courts seem willing to reject a claim as unnecessary or abusive.⁷⁴

Once again, it is clear that Congress—either directly or through the IRS—has made a normative determination that it should not be within the province of the courts to deny drug or health expenses to debtors except in extreme circumstances. The courts have gladly acquiesced in this decision. While food expenses do not get the same deference, there is perhaps a reasonable basis for the distinction: drug consumption varies much more significantly than food expenses, and the consequences of underutilizing clinically-indicated drugs are significantly more acute than under-eating. Moreover, the problem of under-consumption of drugs is more widespread, with a staggering 43.0% of debtors reporting that they failed to fill a prescription within the two years preceding bankruptcy.⁷⁵ Whatever the reasoning, the outcome is apparent:

⁷³ *In re Renner*, 70 B.R. 27 (Bankr. D. N.D. 1987) (allowing a monthly drug expense of \$100); *In re Bryant*, 47 B.R. 21 (Bankr. D. N.C. 1984) (allowing monthly medical/drug expense of \$200).

⁷⁴ *In re Lipford*, 397 B.R. 320 (Bankr. M.D.N.C. 2008).

⁷⁵ 53.6% also neglected needed doctor or dentist appointments. Himmelstein et al., *supra* note 58.

for all debtors seeking bankruptcy relief, claimed expenses for drugs and health expenditures carry a strong presumption of validity.

C. CIGARETTES IN BANKRUPTCY

Thus far, we have seen that the bankruptcy system tends to allow expenses in accordance with normative determinations of “necessity,” with food ranking moderately and drugs ranking highly. For the 20.6% of American adults who smoke,⁷⁶ a physical addiction to nicotine certainly creates at least the perception of a necessity, and claiming an expense for a product without which the debtor would experience severe withdrawal symptoms is not inherently unreasonable. Formal classification of cigarettes as a “necessity,” however, is untenable both as a matter of law and public policy. The bankruptcy system reflects this concern, with tobacco expenses generally disallowed or judicially rejected.

1. Means-Test: Treatment of cigarettes by § 707(b) is quite straightforward—they are not mentioned.⁷⁷ Above-median debtors, regardless of chapter, are simply allowed no deductions for tobacco expenditures. By contrast, smoking cessation products like nicotine patches could likely be characterized as health costs and granted a limitless allowance under the Code.⁷⁸ Although harsh to smokers, there is nothing facially absurd about this discrepancy, as financial disincentives against smoking and incentives for quitting are rational public policy. Nevertheless, the mechanisms in place are poorly tailored, and the discussion that follows will show the unintended effects of the current system.⁷⁹

The consequences of this disallowance are different based on the chapter under which the debtor seeks relief. For those in Chapter 7, it makes the successful filing of a bankruptcy petition

⁷⁶ Among those in poverty the estimate is 31.1%. CDC.gov, *Adult Cigarette Smoking in the United States: Current Estimate*. http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

⁷⁷ 11 U.S.C. § 707 (2010).

⁷⁸ See Part II.B.1.

⁷⁹ Part III will also explain the larger-scale inequities and inconsistencies of this system.

more difficult. What before bankruptcy was perhaps a \$100-\$200 monthly expense becomes excluded under the means test, thus artificially increasing the calculated excess of income over expenditures. This pushes the debtor that much closer to the statutory limits of § 707(b)(2)(A)(i), which, if exceeded, presumptively forces the debtor into Chapter 13 or out of bankruptcy.⁸⁰

Debtors in Chapter 13 face a different conundrum from the means-test disallowance. Because they must live with their confirmed budget for a period of three to five years, such debtors must confront the exclusion head-on. They must either quit smoking or reduce their expenses on other items, such as food or clothing, to make up the shortfall.⁸¹ There is some leeway built into the system, such as a National Standards' allowance for miscellaneous expenses,⁸² but the tobacco exclusion certainly makes tight Chapter 13 budgets even tighter. In turn, this increases the risk of non-completion, which denies the debtors any discharge of their debts, thereby undermining the debt-relief purposes of the Bankruptcy Code.

2. “Abuse” Standard: Intuitively, one would expect a standard as broad as “abuse” to elicit a wide range of judicial constructions with regards to cigarette expenditures. However, the response has been almost universally to reject these expenses, and therefore to disallow Chapter 7 protections to below-median debtors unless the plan can be revised after the exclusion of cigarettes. Courts have rejected cigarette expenses as low as \$97 per month,⁸³ and any expense higher than that is nearly certain to be classified as abusive.⁸⁴

⁸⁰ 11 U.S.C. § 707(b)(1) (2010).

⁸¹ Debtors in Chapter 13 need not provide receipts for their expenses during the administration of the plan, so re-allocating expenses from one category to another will not have adverse legal consequences.

⁸² IRS.gov, *supra* note 12.

⁸³ *In re Peluso*, 72 B.R. 732 (Bankr. N.D.N.Y. 1987).

⁸⁴ See *In re Stickney*, 370 B.R. 31 (Bankr. D. N.H. 2007) (\$105/month); *Waites v. Braley*, 110 B.R. 211 (Bankr. E.D. Va. 1990) (\$150-\$200/month); *In re Newsom*, 69 B.R. 801 (Bankr. D. N.D. 1987) (\$150/month).

Despite the widespread rejection of cigarette expenses under this standard,⁸⁵ courts are often insistent that they are not imposing a *per se* rule against cigarettes, for example by claiming that “far more important is consideration of what is to be the fair division of a debtor’s future income between his creditors and himself.”⁸⁶ This claim is questionable, however, especially given the track record of courts evaluating such expenses, and other judges have indeed come closer to admitting that cigarette expenditures are *per se* abusive. In *Brooks*, for example, the presiding judge plainly explained that “[c]igarettes are not a reasonable necessary living expense,”⁸⁷ while also citing to a case that called tobacco a “luxury expense.”⁸⁸

In rejecting cigarette expenses under this test, courts are also often careful to note that they are doing so not out of any personal bias or prejudgment. In *Peluso*, for instance, the judge maintained that “the Court will not impose its personal views as to how one should lead their [sic] life.”⁸⁹ Once again, however, we should be skeptical of the judges’ assertions, for it is hard to imagine that, in the absence of clear law on the matter, judges from around the country would come to a ubiquitous consensus unless there were some interference of some personal views about the validity of cigarettes as a claimed expenditure.

3. “Reasonably Necessary” Standard: Although the standards for below-median debtors in Chapters 7 and 13 seem to confer similar discretion on judges, courts evaluating Chapter 13 plans are significantly more likely to allow expenses for cigarettes than in liquidation proceedings. The basic reason for this discrepancy is fairly straightforward: forcing debtors to

⁸⁵ Note that the majority of Chapter 7 petitions are resolved without trial, and the standard practice of bankruptcy judges evaluating uncontested, run-of-the-mill liquidation petitions is not easily determined.

⁸⁶ *In re Lang*, 2007 WL 2777770 (Bankr. N.D. Ohio 2007) (quoting *In re Mars*, 340 B.R. 844, 850 (Bankr. W.D. Mich. 2006), and arguing instead that cigarette expenses merely raise a red flag).

⁸⁷ *In re Brooks*, 406 B.R. 382, 391 (Bankr. D. Minn. 2009). This sounds like a Chapter 13 standard, but the case was actually decided under Chapter 7’s “abuse” test.

⁸⁸ *In re Williams*, 233 B.R. 423, 429 (Bankr. D. Mo. 1999).

⁸⁹ *In re Peluso*, *supra* note 83, at 738.

abstain from cigarettes for three to five years is a much harsher mandate than merely disallowing the expenses in a means-test calculation for Chapter 7 eligibility.

Many courts have addressed the proper treatment of cigarettes for below-median debtors in Chapter 13, and they tend to take a fairly nuanced approach to the issue. In *Woodman*, for example, the presiding judge rejected the implementation of a *per se* rule against cigarettes by examining the policy ramifications of such an action.⁹⁰ First, a universal disallowance would inherently be based on the personal views of judges, and would therefore “clothe subjective moral judgments with the force of law.”⁹¹ Second, forbidding an expense for cigarettes would unavoidably lead to the slippery-slope disallowance of all other morally or economically questionable behavior (such as alcohol, candy, or scented soap), putting the court in the uncomfortable position of having to form opinions on the lifestyle choices of debtors.⁹² Finally, cigarettes are lawful activity, and removing them from bankruptcy budgets “would effectively outlaw smoking for all Chapter 13 debtors,”⁹³ which is beyond the province of the courts.

Most courts agree with the conclusion that a *per se* exclusion is the wrong approach in Chapter 13, but there remains no consensus on what expenses are appropriate under § 1325(b)(2), nor even on what approach to take. Many courts, including in *Woodman* itself, have ultimately decided to give debtors the benefit of the doubt and to approve their requested cigarette expenses.⁹⁴ Others preserve the fact-intensive examination proposed by *Woodman*,⁹⁵ but eventually decide that the cigarette expenses are excessive and must be reduced before the

⁹⁰ *In re Woodman*, 287 B.R. 589 (Bankr. D. Me. 2003).

⁹¹ *Id.* at 592.

⁹² *Id.*

⁹³ *Id.* at 592-93.

⁹⁴ *In re Gharavi*, 335 B.R. 492, 499-500 (Bankr. D. Mass. 2006) (citing *Woodman* in allowing a \$175/month cigarette expense); *Woodman*, *supra* note 90, at 596-97 (allowing a \$240/month cigarette expense); *In re Regan*, 269 B.R. 693, 698 (Bankr. W.D. Mo. 2001) (allowing a \$40/month cigarette expense).

⁹⁵ *Woodman*, *supra* note 90, at 593 (explaining that “one would be hard-pressed to fashion a more case specific standard [than the reasonably-necessary test]”); *In re Buntin*, 161 B.R. 466, 468 (Bankr. W.D. Mo. 1993) (finding a cigarette expense of more than a pack a day unreasonable and unnecessary).

plan can be confirmed.⁹⁶ Still others have declined to evaluate the cigarette expenses themselves, but rather used them as evidence in a holistic determination that the debtor's budget allocated an unreasonably small amount to creditors.⁹⁷

Standard of Review			
	Means-Test	Abuse	Reasonably Necessary
Food	Gross amounts listed in IRS Standards. -Scaling effects. -Not particularized. -No normative considerations. -No upward or downward variation possible.	Judicial discretion, with large variation in standards applied. Some short-hand exclusionary rules against certain expenses. Many judges flexible.	Ambiguous balancing tests commonly created. General trends hard to identify here.
Drugs	Minimum allowance in IRS Standards. Unlimited expenses allowed if necessary, substantiated, and not elective.	Extremely lenient and deferential to debtors.	Extremely lenient and deferential to debtors.
Cigarettes	Not mentioned in Code. No allowance.	Almost always rejected by judges as abusive.	No per se rule against cigarettes, but actual treatment varies.

Table 4: Summary of the treatment of three substances under the three bankruptcy standards.

⁹⁶ *In re Webster*, 2002 WL 32700045 (Bankr. D. Mass. 2006) (reducing a cigarette expenditure from \$250 to \$100).

⁹⁷ *In re Smith*, 1995 WL 20345 (Bankr. D. Idaho 1995); *In re Johnson*, 115 B.R. 159 (Bankr. S.D. Ill. 1990).

III. ADVERSE CONSEQUENCES OF THE BANKRUPTCY CODE'S AND JUDGES' TREATMENT OF SUBSTANCES

A. HORIZONTAL INEQUITY: CHAPTER 7 VERSUS CHAPTER 13

As we have seen, debtors in the two relevant chapters are not treated equally by the bankruptcy system, with Chapter 13 claimants afforded substantially more latitude in their expenses than those in Chapter 7. Although flexible at times, judges are quick to reject high food expenses in Chapter 7, and often have *de facto* rules against whole categories of expenditures, such as dining out.⁹⁸ Cigarettes are even harder to claim, with judges universally rejecting Chapter 7 cigarette expenses.⁹⁹ In Chapter 13, by comparison, judges seem to be flexible with food costs,¹⁰⁰ and they even accept cigarettes if the amounts requested are reasonable.¹⁰¹

It is a general principle of law that parties in the same situation ought to be treated similarly under the law¹⁰²—a concept known as horizontal equity. It does not necessarily follow from this that two people seeking protection under different chapters of a statute should be governed identically, but where possible the law should still promote uniformity. There is value in consistency itself, and if the law creates undue incentives for one chapter over another—in this example, for Chapter 13 over Chapter 7—it is essentially diluting the statutory protections available under the Bankruptcy Code.¹⁰³

In theory, the various bankruptcy provisions exist to maximize the returns to creditors without sacrificing the debtors' chances of financial recovery, and any differences in the two chapters may reasonably be attributable to the differing legal necessities of the two separate

⁹⁸ See *supra* Part II.A.2.

⁹⁹ See *supra* Part II.C.2.

¹⁰⁰ See *supra* Part II.A.3.

¹⁰¹ See *supra* Part II.C.3.

¹⁰² Aristotle, THE NICOMACHEAN ETHICS 313-17 (H. Rackham trans., Everyman's Library ed., 1947).

¹⁰³ Cf. Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 11-13 (discussing the "forms and causes of lack of uniformity in the current system").

paradigms. Likewise, the fact that Chapter 13 debtors remain in bankruptcy for three to five years perhaps justifies more lenient treatment than in Chapter 7.

Although this reasoning is plausible, the language of the Bankruptcy Code instead seems actively to promote horizontal equity: above-median debtors are governed by identical rules in both chapters, and below-median debtors' expenses are evaluated by similar standards of review. Moreover, while the differing nature of the two chapters may justify discrepancies in financial matters like secured debt or outstanding contracts, it should not affect allowable expenses on basic necessities like food or drugs. The allowance for these substances, rather, speaks to what a reasonable person in financial distress should be allowed to consume, regardless of whether that analysis is for determining liquidation eligibility or evaluating the adequacy of a pay-out plan.

A textualist reading of the statute is therefore insufficient to explain the asymmetric treatment. Instead, it is likely that the discrepancies are perpetuated by a systemic preference of Chapter 13 plans over Chapter 7, both by Congress and by bankruptcy judges. This motivation was explicit in the legislative history of BAPCPA,¹⁰⁴ and it now seems an intractable feature of expense evaluation. In Chapter 13, which requires only that a cost be reasonably necessary, Congress sought primarily to prevent luxury expenditures, not to deny basic expenses during the plan's administration.¹⁰⁵ Chapter 7, especially after BAPCPA, instead anticipates abusive behavior by debtors who are seeking to avoid their financial responsibilities with a quick fix.¹⁰⁶ The distinction is intangible, but it is also undeniable and unfortunate. Treating one class of debtors as trustworthy and another as villainous, even though in practice they are often quite interchangeable, seems to undermine the very notion of horizontal equity.

¹⁰⁴ See generally Jensen, *supra* note 4.

¹⁰⁵ Collier on Bankruptcy, *supra* note 10, at ¶ 1325.11.

¹⁰⁶ *Id.* at ¶ 707.04.

B. HORIZONTAL INEQUITY: GEOGRAPHIC VARIATION

The Bankruptcy Code, as a federal statute designed largely to protect consumers, ought to treat debtors from all parts of the country equally. The language of the Code achieves this neutrality, and its treatment of drug and cigarette expenses also seems consonant with this goal, with one nearly always approved and the other nearly always rejected. When we look at how food is treated, however, we see that there is actually wide geographic variation.

Classification as above- or below-median is accomplished by comparing the debtor's income to the state median, in order to reflect geographic earning disparities.¹⁰⁷ When determining the allowances under the means test, however, most expenses (including food) are based on the IRS National Standards, which have no geographic component and therefore take no measure of regional variations in prices and cost of living.

In order to make this problem more concrete, let us imagine two Chapter 13 debtor families of three people, one in Boston and one in Atlanta, each earning \$100,000 per year. In Massachusetts, the current median income for such a family is \$83,736, while in Georgia it is \$56,682;¹⁰⁸ therefore both families are above the median, though our Atlanta family is relatively much better off. The IRS Standards set aside \$639 per month for food.¹⁰⁹ An average family of three in Boston, however, spends \$851 per month due to high prices of food in the city,¹¹⁰ and they will therefore likely face a shortfall in bankruptcy. By contrast, an average Atlanta family of

¹⁰⁷ 11 U.S.C. §§ 707(b)(6), 707(b)(7), 1325(b)(3).

¹⁰⁸ U.S. Trustee Program, *Census Bureau Median Family Income by Family Size* (filed on or after 3/15/2011), http://www.justice.gov/ust/eo/bapcpa/20110315/bci_data/median_income_table.htm.

¹⁰⁹ IRS Standards, *supra* note 12.

¹¹⁰ The average Boston household has 2.4 members and spends \$8,167 on food per year. Simple arithmetic gives an average monthly expense of \$850.73 for a family of 3. BLS.gov, *Table 21. Selected Northeastern Metropolitan Statistical Areas: Average Annual Expenditures and Characteristics, Consumer Expenditure Survey, 2008-2009*. <http://www.bls.gov/cex/2009/msas/northeast.pdf>.

three spends only \$560 for food, leaving them with a significant surplus.¹¹¹ If this family instead lived in rural Georgia, the discrepancy would be even greater.

What is most amazing about this feature of the bankruptcy system is how easily it could be avoided. The BLS' Consumer Expenditure Survey, on which the IRS bases its standards, already collects regional, state, and even local data on food prices, and these data could therefore be implemented into the means test numbers with little difficulty. The IRS has offered no explanation for this omission, and there seems no valid justification other than simplicity. So glaring is the omission that an administrative challenge to the standard claiming "arbitrary and capricious" rulemaking might require an alteration to the rule.

The existing system is poorly-constructed and plainly unfair. Half of above-median debtors currently find themselves with an insufficient food budget, while the other half receives a windfall from their creditors. Both creditors and debtors would therefore benefit from a more individualized system that evaluates actual food needs, as existed before BAPCPA. Alternatively, Congress could require the IRS to base its standards on regional, state, or local food prices in order to reflect the necessary costs more accurately. Until Congress or the IRS decides to implement these changes, the inequities of geographic variation will persist.

C. VERTICAL INEQUITY: ABOVE-MEDIAN VERSUS BELOW-MEDIAN

In light of the substance discussions in Part II, it is not immediately clear which class of debtors (above-median or below-median) gets better treatment under the Bankruptcy Code. Below-median debtors in Chapter 13, unlike above-median debtors in either chapter, have a reasonable chance of getting their cigarette expenses approved.¹¹² On the other hand, above-

¹¹¹ See note 110 for the methodology of deriving this number. BLS.gov, *Table 23. Selected Northeastern Metropolitan Statistical Areas: Average Annual Expenditures and Characteristics, Consumer Expenditure Survey, 2008-2009*. <http://www.bls.gov/cex/2009/msas/south.pdf>.

¹¹² See *supra* Parts II.C.1 and II.C.3.

median debtors have a statutorily-guaranteed limitless allowance for drug and health costs,¹¹³ while those below the median are at least theoretically constrained by judicial discretion.¹¹⁴ As for food, more flexibility is available for below-median debtors, but their expenses are also subject to greater scrutiny and a higher likelihood of rejection for normative reasons.¹¹⁵

This overall confusion is largely due to the establishment of the means test by BAPCPA, which, as one court noted, leads to anomalous and unpredictable results for above-median debtors.¹¹⁶ That same court, in quoting bankruptcy judge Keith Lundin, explained that the means test numbers will “routinely be both insufficient to sustain life and in excess of any amount that would survive the reasonable and necessary test of pre-BAPCPA law.”¹¹⁷ At times, either group might receive preferential treatment, but the differences will be based not on any legislative reasoning but rather on the arbitrary effects of the extant IRS numbers. This leads to random and unprincipled inequities throughout the entire bankruptcy system.

Although below-median debtors are sometimes treated better than above-median filers, most scholars agree that in the aggregate above-median debtors are treated much more generously by the Code. This is attributable to the fact that “in practice it is more common that the debtor's actual expenses are below the IRS standard allowances.”¹¹⁸ We saw this possibility for both food and drugs, but the observation is even more acute for other types of expenses not discussed in this paper, such as the uncapped allowances for payments of secured debts attached to cars and primary residences, both of which give above-median debtors enormous advantages over their below-median counterparts.¹¹⁹

¹¹³ See *supra* Part II.B.1.

¹¹⁴ See *supra* Part II.B.2.

¹¹⁵ See *supra* Parts II.A.1, II.A.2, and II.A.3.

¹¹⁶ *In re Phillips*, 382 B.R. 153, 158-60 (Bankr. D. Mass. 2008).

¹¹⁷ *Id.* at 159 (quoting 5 Keith M. Lundin, *Chapter 13 Bankruptcy*, 466-2-466-3 (3d ed. 2000 & Supp. 2006)).

¹¹⁸ Tulis, *supra* note 28, at 358-59.

¹¹⁹ 11 U.S.C. § 707(b)(2)(A)(iii) (2010).

This income-based differential treatment has several flaws. First, inconsistencies like this should generally be avoided, as they add complexity by requiring two separate standards. Second, the generous treatment of above-median debtors is unfair to creditors,¹²⁰ who are essentially forced to subsidize many costs that would likely be rejected under a less deferential standard. Third, and most importantly, preferential treatment for wealthier debtors is patently unjust, a form of vertical inequity that the law should avoid when possible. Some scholars have suggested that this current problem is so widespread as to require judicial scrutiny,¹²¹ but so far the courts have not been open to equal protection constitutional challenges.¹²²

The current system is certainly better than it was just a few years ago. Between the creation of the means test in 2005 and the end of 2007, those with higher incomes were legally entitled to higher allowances under the IRS Standards; the richest individuals, for example, got \$483 per month for food, while the poorest got only \$175.¹²³ The IRS quietly replaced this arrangement in 2008, but the systemic bias against below-median debtors remains, albeit in more subtle forms. In its attempt to fight debtor abuse, a danger that scholars now agree was little more than a phantasm,¹²⁴ Congress seems to have embraced vertical inequity. Until amended, the bankruptcy system will remain burdened by this symbolic failure.

D. INCONSISTENCY: JUDICIAL INTERPRETATIONS OF THE LAW

Any statute that allows for significant judicial discretion will unavoidably lead to wide variations in how judges interpret and implement the law. When such variation exceeds normal

¹²⁰ Tulis, *supra* note 28, at 379-80 (noting that “the means test proves unfair to creditors when it allows debtors to pay less than they are capable”).

¹²¹ *Id.* at 372 (arguing that “the problem of the inequitable treatment of below- and above-median income debtors’ expenses in chapter 13 cases demands that § 707(b)(2) be subject to judicial scrutiny.”).

¹²² See, e.g., *In re Cox*, 393 B.R. 681, 688-95 (Bankr. W.D. Mo. 2008) (raising an unsuccessful equal protection claim to the differential treatment of above- and below-median debtors).

¹²³ U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses*, (10/15/2007 – 12/31/2007), http://www.justice.gov/ust/eo/bapcpa/20071015/bci_data/national_expense_standards.htm.

¹²⁴ Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Act of 2005*, 79 AM. BANKR. L.J. 191, 191 (2005).

levels, however, it can lead to unpredictability and unfair inconsistency, with individuals treated arbitrarily by a system that lacks federal cohesion.

Unfortunately, the bankruptcy system shows signs of such inconsistency, largely due to inherent ambiguity in phrases like “abuse” and “reasonably necessary.” In reviewing this issue, for example, the National Bankruptcy Review Commission found that “[C]hapter 13 practices differ from state to state, district to district, and even from judge to judge,”¹²⁵ and therefore that “debtors in similar circumstances encountered very different [C]hapter 13 systems.”¹²⁶ The problem was unfortunately not addressed by BAPCPA, and if anything has gotten worse:

It is now two years since the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and as shown by extensive majority and minority positions on a significant number of its provisions, there is little consensus on much of the enacted text of BAPCPA. . . . Although it would be unreasonable to expect complete, or nearly complete, uniformity in the interpretation of BAPCPA, the stark differences in how the new law is being interpreted throughout the nation's bankruptcy courts have compromised, if not crippled, any pretense of predictability in the analysis a court might apply in interpreting its many poorly drafted provisions.¹²⁷

This problem is evident in the Code's treatment of substances. It is difficult to tell when food expenses will be deemed excessive,¹²⁸ and different courts have come to every conceivable conclusion on what (if any) cigarette expenses are reasonably necessary.¹²⁹ Inconsistency is not easily solved, but Congress could blunt its effects by issuing clarifying language or by declaring background expense numbers—although such fixes could potentially cause further problems. The Supreme Court could do the same by offering its own construction of the relevant standards. Until some fix occurs, however, debtors will be at a loss for what they may spend.

¹²⁵ Elizabeth Warren et al., NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS (1997), *available at* <http://govinfo.library.unt.edu/nbrcreportcont.html> (cited in Tulis, *supra* note 28, at 350).

¹²⁶ Tulis, *supra* note 28, at 350-51.

¹²⁷ Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective after Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 195-96 (2007) (internal footnotes omitted).

¹²⁸ See *supra* Parts II.A.2 and II.A.3.

¹²⁹ See *supra* Part II.C.3.

E. INCONSISTENCY: BANKRUPTCY VERSUS OTHER FEDERAL AGENCIES

Few legal scholars argue that all federal statutes share a common purpose, or that unconnected agencies write rules with mutual uniformity. Nevertheless, consistency in the administration of federal laws is an important goal, both for increasing predictability in the legal system and for the symbolic reason of promoting cohesion in the language, missions, and operations of the various statutes and agencies.

A quick glance at the treatment of substances by the bankruptcy system reveals a stunning lack of federal uniformity. Regarding drugs, the Code essentially forces creditors to pay for their debtors' drug and health expenditures. This is without regard to whether the drugs purchased are approved by the Food and Drug Administration, or to whether the medical services are sufficiently medically-indicated as to be covered by the Centers for Medicare and Medicaid Services.¹³⁰ Adding requirements such as these might not drastically affect bankruptcy cases, but at the very least it would assure creditors that the courts will not force them to pay for products and services that other arms of the government do not even recognize.

As for cigarettes, the opposite problem arises. Although several state and local governments have banned smoking in certain settings, the purchase and use of cigarettes remains lawful activity throughout the United States. On the other hand, the IRS Standards do not allow them to be purchased, and most bankruptcy judges reject tobacco expenditures as unnecessary or abusive.¹³¹ The result is quite troublesome: the statutory protections of the Bankruptcy Code are essentially unavailable to people who are engaging in lawful activity.

The allowances for food under the means test also expose a troubling inconsistency. These numbers, codified by the IRS, are based on the BLS' Consumer Expenditure Survey,

¹³⁰ See *supra* Part II.A.

¹³¹ See *supra* Parts II.C.2. and II.C.3.

which tracks actual spending patterns, rather than the amounts actually necessary or recommended.¹³² This is despite the fact that other government agencies, such as the United States Department of Agriculture (USDA), have developed standards for what households should be spending on a healthy diet. Inconsistency between the numbers is a serious failure.

The first thing that becomes clear when looking at the USDA figures, which are collected by the Center for Nutrition Policy and Promotion (CNPP), is that they differentiate based on the age and sex of the family members.¹³³ This more accurately reflects how much food is required, but is a feature entirely ignored by the IRS, which simply uses aggregate numbers.¹³⁴ In short, the Bankruptcy Code tells families that they get a flat amount regardless of family characteristics, while the USDA down the street acknowledges that men eat more than women and that older children eat more than toddlers. The inconsistency is glaring.

The second discrepancy appears in the analysis of the numbers themselves. The USDA CNPP offer four tiers of healthy food plans, corresponding to a Thrifty, Low-Cost, Moderate-Cost, or Liberal food budget.¹³⁵ When comparing these amounts to those under the IRS Standards, however, it is clear that the IRS numbers bear little relation to what the government has elsewhere determined. The IRS budget for a family of two is \$537 per month, which falls in between the average Low-Cost (\$459.60) and Moderate-Cost (\$569.90) plans.¹³⁶

A family of four, meanwhile, gets \$757 from the IRS; for a family with children ages 2-3 and 4-5, this falls between the Low-Cost (\$667.20) and Moderate-Cost (\$823.60) plans, but for families with slightly older children (6-8 and 9-11) it is in between Thrifty (\$603.10) and Low-

¹³² See *supra* Part II.A.1.

¹³³ USDA.gov, *Official USDA Food Plans: Cost of Food at Home at Four Levels: U.S. Average, February 2011*, <http://www.cnpp.usda.gov/Publications/FoodPlans/2011/CostofFoodFeb2011.pdf>.

¹³⁴ IRS.gov, *supra* note 12.

¹³⁵ USDA.gov, *USDA Food Plans: Cost of Food*, <http://www.cnpp.usda.gov/USDAFoodPlansCostofFood.htm>.

¹³⁶ USDA.gov, *supra* note 133.

Cost (\$783.00). Taking these rules at face value, the Bankruptcy Code is telling families with young children that they may spend a low-to-moderate amount of food, while families with older children must be significantly thrifter, as defined by the government itself!

So far, the means-test numbers may not seem particularly troubling, as they all fall within USDA recommendations for a healthy diet, albeit at different levels. This is not the case for the marginal IRS figures, however. Adding a third person to the family yields an extra \$102 in bankruptcy. This, according to the CNPP, corresponds to a thrifty budget for children 1-5, and for anyone else is below the amount necessary to maintain a healthy diet.¹³⁷

The Bankruptcy Code does not merely allow these outcomes—it mandates them. Congress could easily fix this by cross-referencing not to arbitrary IRS numbers but rather to the carefully-considered USDA amounts. Similarly, it could reduce inequities by choosing one of the CNPP plans (say, Low-Cost) and sticking to those figures throughout. The improvements in consistency and equity that could result from so simple an amendment are quite impressive.

IV. CONCLUSION

Filing for bankruptcy is inherently a balancing act between debtors and creditors, and tough decisions have to be made in order to guarantee equitable monetary distributions. Nowhere are these decisions more personal than in determining what one is entitled to put into one's body. For this reason, the treatment of food, drugs, and cigarettes is a particularly important subject, even if these costs are small compared to other debtor expenses.

The Bankruptcy Code, in order to remain fair and consistent, needs to be more careful about how it treats these substances. It should not automatically reject expenses for lawful activities like smoking, nor should it allow all drug and health expenditures without any scrutiny

¹³⁷ *Id.*

of cost or category. As for food, the Code needs to implement a more thoughtful system than merely parroting the IRS for above-median debtors and allowing judges to decide what amounts are excessive for below-median debtors by using arbitrary and unreviewed standards.

Throughout the discussion of these substances and the adverse consequences related to their treatment, this paper has hinted at two possible solutions. Moving forward, the Bankruptcy Code could decide to give courts more discretion, essentially by going back to the pre-BAPCPA system in which judges decided what expenses were necessary.¹³⁸ Such an approach, many scholars argue, would allow flexible common law to replace rigid statutory numbers. Bankruptcy judges know best, and with the authority to ensure a fair result the system might improve.¹³⁹

An alternative is to reduce judicial discretion, thereby decreasing the chances for disparate treatment of similar individuals. For example, Congress could apply the means-test numbers equally to everyone, removing the discretionary standards that still exist for below-median debtors. Congress could also link these numbers to those determined by other government agencies (such as FDA, HHS, and USDA) that have thought more thoroughly about what numbers constitute appropriate expenses.

This paper expresses no opinion on which general approach is superior. All that is clear at present is that the bankruptcy system, especially since 2005, has perpetuated some basic inequities and inconsistencies that are both symbolically troublesome and easy to address. When Congress next sees fit to amend the Bankruptcy Code, it should be mindful that asking debtors to tighten their belts without considering these basic consequences is not a reasonable solution. Only then can the Bankruptcy Code truly give a fair and fresh start to debtors in need.

¹³⁸ See Jensen, *supra* note 4, at 526-27 (referencing Chairman Hyde's recommendations, during consideration of the BAPCPA amendments, to leave judicial discretion in place).

¹³⁹ Tulis, *supra* note 28, at 387-89.